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SHOULD THE CONSTITUTION BE AMENDED TO INTRODUCE PUBLIC PARTICIPATION TO COURTS: IF SO, TO WHAT EXTENT?

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Abstract

This research paper analyses the participation of members of the public (public participation)[1] in the administration of justice, focusing on the problematic aspects of constitutional regulation. Constitutional amendments should establish a regulation that allows members of the public to participate in the administration of justice.

The **purpose** of this paper is to discuss whether the fact that public participation is not established at the constitutional level in other European Union (hereinafter, the EU) countries violates the principles of separation of powers or constitutional rule of law. This paper also aims at discussing why the amendment to the Constitution is necessary for Lithuania, and what the scope of such an amendment should be so that the integrity of the Constitution of the Republic of Lithuania (hereinafter, the Constitution) is maintained, and the compliance with the requirements of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter, the Convention) is ensured.

Design/methodology/approach. A qualitative research has been carried out. The following data collection methods were used: questionnaires made up of open-ended questions (the survey was conducted via email) as well as an interview (the interview with Prof. Egidijus Kūris via email), thematic analysis, and document selection. The following data processing methods were used: the data was processed by analysing the contents of the documents and summarising the educational (legal) practice. The following data analysis methods were used: a dogmatic and comparative analysis. The data regarding the level of regulation of public participation was collected remotely from the participants and experts (judges, representatives of courts, scholars, representatives of ministries of justice) from various EU countries. The data was collected, processed, and analysed from spring 2019 until the submission of this paper for publication, i.e. spring 2020. The participants of the study were asked problem questions related to constitutional regulation. Research papers, other literature related to the issue of the study, constitutions of EU countries, and other international and national legislation were analysed. The scope of the study is the legal framework of EU countries and selected from them the EU countries that have lay participation established only at the legislative (ordinary) level instead of the constitutional level. The data for the research was collected from Estonia, Malta, Finland, Sweden, Hungary, and Germany. In addition, Poland, Latvia, Slovenia, Slovakia, and Norway were included in the study with regards to the amendment of Article 112(5) of the Constitution. The participants from Latvia, Slovenia, Slovakia, and Norway agreed to participate in the study; however, they were unable to provide answers before submitting the paper for review.

[1] Two basic forms of lay participation in the administration of justice in contemporary legal systems may be distinguished (Pomorski, 1975, p. 198–209), i.e. the jury (court jurors), and lay judges (non-professional judges, lay participation, lay people, lay member, lay men (women). In the Lithuanian context, the term *tarėjai* is often used). These lay participants usually do not have legal training; the administration of justice is not a daily activity for them, and they do not make a living from it. *The jury* or *court jurors* means a group of individuals that have to make findings of fact. During a trial they decide on the truthfulness of the facts of the case and decide whether an individual is guilty while the judge decides on the applicable law, and if certain evidence should be presented to the jury. There are two types of juries: *grand jury* which decides whether an individual is guilty, and *petit jury* (trial jury) that hears trial cases (Callahan, 1997, p. 6). *Lay judges* usually have equal rights with the judge in that they adjudicate not only on questions of fact, but also questions of law.

The findings. For the EU countries that have lay participation established at the legislative (ordinary) instead of the highest (constitutional) level, it is not necessary to amend the Constitution. This is due to the differences among the countries, their systems and mentality, methods and tradition of constitutional interpretation and constitutional identity. However, within the context of the Lithuanian legal system, it is necessary to amend the Constitution. In order to maintain the integrity of the Constitution, and to harmonise constitutional regulation with the requirements of the Convention, four articles of the Constitution should be considered: amending Article 48(4) of the Constitution, supplementing Article 109 of the Constitution with Paragraph 5, supplementing Article 111 of the Constitution with Paragraph 5, and amending Article 112(5) of the Constitution.

Research limitations/implications. Not all EU countries participated in the research, i.e. Ireland, Austria, Greece, Cypress, Luxembourg, and Portugal did not participate. Since not all the representatives expressed their consent to their opinions being published, in order to protect their personal data, the identities of such participants have not been presented in the paper. Only those who agreed to be quoted with their full name and place of work have been identified in the paper.

Practical implications. Recommendations for further practice so that if the remaining countries decide to introduce public participation to the administration of justice, they can assess whether it is necessary to intervene in the constitution. Meanwhile, countries that have established public participation only at the legislative level may evaluate their constitutional identity with regards to the necessity to amend or supplement their constitutions. There are ongoing discussions in the EU countries about how to select lay judges so that their independence is ensured; therefore, this paper analyses whether lay judges should be introduced to the judiciary system in the same way as professional judges are.

Originality/Value. There is a draft amendment to the Constitution registered at the Seimas of the Republic of Lithuania (hereinafter, *the Seimas*). The draft amendments to the Constitution No. XIIIP-3273 were considered in the Committee on Legal Affairs during the autumn session of the Seimas. However, the draft amendments received a lot of important observations, especially from scholars, due to which the consideration was postponed. It is currently unclear whether the authors of the draft amendments plan to clarify the document or not. This contributes to the relevance of the topic and the necessity to publicise the extent of the amendments to the Constitution.

Keywords: lay judges, selection of lay judges, constitution, amendments to a constitution, constitutional amendments, the principle of separation of powers, the principle of constitutional rule of law, the principle of integrity.

Research type: research paper.

JEL classification: K100, K400.

Introduction

This paper analyses whether the participation of members of the public in the administration of justice should be embedded in the Constitution, and if so, to what extent. It is an important issue since in order to introduce lay judges to courts, a draft amendment to the Constitution has been registered at the Seimas (registration No. XIIIP-3273). The draft amendment is concerned with two articles of the Constitution. Article 48(4) of the Constitution is amended as follows: "<…> citizens' activity as a lay judge <…> shall not be considered forced labour" and Article 109 of the Constitution is supplemented with Paragraph 5: "In the cases established by law, citizens who have taken the oath of a lay judge consider cases and adopt decisions together with judges".

These amendments suggest following in the footsteps of continental law countries, as many EU countries have done, by introducing public participation to the administration of justice through lay judges instead of jurors: the rights of lay judges are equal to those of the judge, and lay judges decide not only on the questions of fact (much like jurors in common law systems) but also on the questions of law. They have voting rights, i.e. make decisions along with the judges.

This paper consists of three parts. In the first part, the legislation of the EU countries that have public participation established at the legislative (ordinary) level and not the highest (constitutional)

level, i.e. Estonia, Malta, Finland, Sweden, Hungary, and Germany has been analysed. In the second part, the fact that the introduction of public participation in Lithuania would require a constitutional amendment that would state that courts are made up of lay judges as well, and that their involvement in dealing with cases is established by law. However, this would not only result in the amendment of Article 109 of the Constitution, but also in a supplement of Article 111 of the Constitution with Paragraph 5 which would state that the appointment and dismissal, legal status, and guarantees of independence of unprofessional judges are established by law. In the final, third part of this paper, the selection of citizens is discussed, including the need to amend the respective Article 112(5) of the Constitution, i.e. supplementing the statement that "A special institution of judges provided for by law shall advise the President of the Republic on the appointment, promotion, transfer of judges, or their dismissal from office" with that it also decides on the appointment and dismissal of lay judges or participates in the selection of lay judges.

Before delving into the analysis, it is appropriate to summarise what we know about the research question for the readers. For this purpose, the essential research focused on this issue was reviewed (literature review).

E. Kūris has severely criticised the circumvention of the Constitution in his paper stating: „It is of no importance whether the *tarėjai*[2] are modelled after lay judges or the jury: it is impossible to introduce this concept without amending the Constitution" (Kūris, 2012, p. 11).

In a 2015 monograph titled "Tarėjų instituto perspektyvos Lietuvoje" [The Prospects of the Institution of Lay Judges in Lithuania] it is also noted that it is necessary to amend the Constitution (Ragauskas, et. al., 2015, p. 7). In order to help to decide on the concept of lay judges in Lithuania, the Law Institute of Lithuania carried out a survey, the results of which were presented in the above mentioned monograph. It is noted in the monograph that "the text of the Constitution mentions the judge as the sole actor of the court (and, in certain provisions, the term *judge* is used as a synonym of the court, as demonstrated, for example, by the comparison of Articles 109(1) and 109(2) as well as Articles 109(1) and 112(6) of the Constitution). The status of the judge, as defined in the text of the Constitution, has at least one limitation that is incompatible with the status of "a member of the public", even if we call the latter "a judge from the public": Article 113(1) of the Constitution states that "a judge may not hold any other elective or appointive office, may not work in any business, commercial, or other private establishments or enterprises. Also, he may not receive any remuneration other than the remuneration established for the justice and payment for educational or creative activities". An individual who only works as a judge and receives remuneration solely for this activity cannot be considered an "unprofessional judge". Therefore, in order to legalise the

[2] Lithuanian term for unprofessional (lay) judges.

institution of lay judges, it should at least be stated in the Constitution that the court is made up of lay judges in addition to professional judges".

In the most recent paper published in 2018, Darijus Beinoravičius, and Milda Vainiutė, analysed the necessity to amend the Constitution. Their opinion is that "the single most important issue regarding the establishment of the institution of lay judges is linked to Chapter IX of the Constitution, "The Court", which establishes the framework and operating principles of courts in the Republic of Lithuania and lays down the mandatory provision that judges are appointed (Article 112 of the Constitution) with the possibility of establishing specialised courts only. There is no mention of the concept of lay judges or the possibility of the introduction thereof. In order to establish this concept, the Constitution should undoubtedly be amended" (Beinoravičius and Vainiutė, 2018, p. 31).

In scientific literature, Vytautas Sinkevičius was a prominent commentator on the topic of constitutional amendments (Sinkevičius, 2005; 2008; 2011; 2012; 2014; 2015; 2016). In 2013, Darius Butvilavičius, defended his dissertation titled "Konstitucijos pataisos" [Constitutional Amendments]. The most recent publication by the team of authors published in 2019, a monograph titled "Konstituciniai ginčai" [Constitutional Disputes], also includes a commentary about amendments to the Constitution. However, the authors of these works did not touch upon the concept of lay judges and the related constitutional amendments.

In this paper, the analysis of the need to amend the Constitution with regards to the introduction of the concept of lay judges into the Lithuanian court system is continued. The Articles of the Constitution that should be amended or supplemented are hereby identified: Article 48(4) of the Constitution should be amended, Article 109 of the Constitution should be supplemented with Paragraph 5, Article 111 of the Constitution should be supplemented with Paragraph 5, and Article 112(5) of the Constitution should be amended. EU countries (Estonia, Malta, Finland, Sweden, Hungary, and Germany) that have public participation established at the legislative (ordinary) level and not the highest (constitutional) level are also discussed in the paper, and the opinions of the representatives of these countries about why constitutional amendments are not necessary in this case are presented.

1. Regulation of public participation in other EU countries

Currently, members of the public (lay judges/jury) do not participate in the administration of justice in five out of twenty-seven EU countries (Lithuania, Latvia, Romania, Luxembourg, and the Netherlands) while this institution exists in the remaining twenty-one, i.e. Greece, Portugal, France, Spain, Germany, the Czech Republic, Estonia, Slovakia, Slovenia, Poland, Hungary, Belgium, Italy, Malta, Ireland, Austria, Bulgaria, Croatia, and the Nordic countries (Denmark, Finland, and

Sweden). In Estonia, Malta, Finland, Sweden, Hungary, and Germany this concept is established not at the highest (constitutional), but the legislative (ordinary) level. This poses a question whether the fact that lay judges and juries are not established at the constitutional level violates constitutions and the principles of separation of powers and constitutional rule of law by entrusting people not explicitly specified in the constitution with the function of administration of justice.

The principle of separation of powers can be divided into two closely interconnected parts: the first is the separation of powers, and the second is the interaction among the powers. The separation of powers is not only the division of powers into the legislative, executive, and judicial branches but also the establishment of their formation procedure, legal status, powers, and competence as well as ensuring the independence thereof. The interaction among powers is the cooperation between authorities, coordination of actions, the functioning of the system of checks and balances which ensures that powers control and prevent each other and maintain their balance (Monkevičius, n.a.). *The principle of constitutional rule of law* means that a lower-ranking law cannot contradict a higher-ranking law: first and foremost, the Constitution (Sinkevičius, 2014, p. 908).

Further, let us examine Estonian lay judge legislation regulation. Thus, under the Estonian Constitution, only the courts administer justice. There is nothing about lay judges in the Estonian Constitution, but there is something in the court's act, and there is a little bit about the lay judges in the Code of Criminal Procedure. Thus, there is a question whether such a regulation of lay judges is in conflict with the constitution? As Andreas Kangur states "*According to Article 146 of the Constitution of Estonia, the power to administer justice is vested in courts, not judges*[3]. *What exactly the role of judges is, and who else may participate in the administration of justice in courts is set forth in statutes relating to the organization of courts and court procedures: there are, for example, judicial deputies who are entrusted with keeping the records of real property, wills, and corporate entities. Law clerks in our courts may issue orders under the judge's name directing litigants to amend their deficient pleadings. So according to my reading, as long as the final word remains with a constitutionally appointed judge, there is no constitutional violation*" (Dr. Andreas Kangur, lecturer of criminal Procedure University of Tartu School of Law). According to Maarja Torga "*there is no conflict – Constitution says that "courts" administer justice (not "judges"). The court is composed of judges, who can be lay judges or "normal" judges*" (Dr. Maarja Torga, judge, a visiting lecturer of private international law in the University of Tartu).

[3] "Justice is administered exclusively by the courts. The courts are independent in discharging their duties and administer justice in accordance with the Constitution and the laws".

Now, let us explore the lay judge legislation in Finland. As Liisa Vanhala claims "*there are no specific provisions of lay judges in the Constitution of Finland*[4]*, even though they assist the courts in the administration of justice by having voting rights (the majority of votes). Provisions that concern courts or the legal system more generally can be found in Sections 3, 21, 98–100, and 103 in the constitution. The Constitutional Law Committee analysed lay judges in its 1996 report. The report can be found only in Finnish*[5] *and Swedish*[6]" (Liisa Vanhala, Counsel to the Constitutional Law Committee). As can be seen, this document shows that the Constitutional Law Committee did not express its opinion on the institution of lay judges. According to other authorities "*the Constitution of Finland contains provisions on the separation of powers (legislative powers, the governmental powers and the judicial powers), the structure of the courts of law and appointing the judges: according to Section 3(3) of the Constitution of Finland, the judicial powers are exercised by independent courts of law. According to Section 98 of the Constitution of Finland, the Supreme Court, the Courts of Appeal and the District Courts are the general courts of law. According to Section 102 of the Constitution of Finland, provisions on the appointment of judges are laid down by an act (meaning statutory level legislation). In Finland, these general provisions of the Constitution of Finland are considered sufficient to safeguard the independence of the courts and the members thereof; that is, professional judges and lay judges. There are no provisions on members of courts that are professional judges and lay judges in the Constitution of Finland. All provisions on courts and members of the courts are laid down in the Courts Act. According to Chapter 1 Section 3 of the Courts Act, the courts exercise the jurisdiction granted to them under the Constitution of Finland. The courts are independent in their exercise of jurisdiction. According to Chapter 1 Section 6 of the Courts Act, a judge (meaning both a professional judge and a lay judge) is independent in the administration of justice. The Courts Act has also provisions on members of the courts. For example, according to Chapter 2 Section 6 of the Courts Act, the members of a district court are the senior district court judge and the district court judges. In addition, a district court has lay judges as other members. These provisions in the Courts Act are not in conflict with the Constitution but instead they complement it*" (Senior Specialist at/of Ministry of Justice, Department for Private Law and Administration of Justice, Court Affairs Unit).

The following is the description of the legislation of lay judges in Germany. According to Jörg Müller "*the Constitution of Germany does not address lay judges specifically and the fact that lay judges do decide in Germany – different to the Anglo-Saxon concept – not only on questions of*

[4] The Constitution of Finland. https://www.finlex.fi/fi/laki/kaannokset/1999/en19990731.pdf.

[5] Perustuslakivaliokunnan mietintö 3/1996 vp (Valtioneuvoston oikeuskanslerin kertomus vuodelta 1994) PeVM 3/1996 vp- K 8/1995 vp. https://www.eduskunta.fi/FI/vaski/Mietinto/Documents/pevm_3+1996.pdf.

[6] Grundlagsutskottets betänkande 3/1996 rd (Justitiekanslerns i statsrådet berättelse för år 1994) GrUB 3/1996 rd -B 8/1995 rd. https://www.eduskunta.fi/SV/vaski/Mietinto/Documents/grub_3+1996.pdf.

proof or sentencing but also on mere questions of law. However, it is the common understanding in my country that all judges – be it professional, lifetime, lay or judges for limited periods – shall be set independent by the constitution in their respective function as long as they carry it out. As I understand it, the constitution did not want to limit the scope of judges that could be established by law later on and focused just on the central requirement, that all judges have to be independent in carrying out this function. In Germany "judges" historically includes "lay judges". Consequently, all the privileges and duties of professional judges also apply to lay judges without mentioning them expressly in the constitutional articles. Subsequently, Article 92 of the Constitution of Germany (GG) does empower parliament to adopt statutes regarding lay judges as well" (Jörg Müller, judge, The President of the Karlsruhe Regional Court). In the opinion of Speyer Martin "*there is no regulation especially concerning lay judges in our constitution. But such a regulation is not needed. Article 101 of the GG rules that everyone has the right to a judgement by a judge assigned by law. In accordance with Section 44 of the German Judiciary Act*[7] *(DRiG), any lay judge may act as a judge only on the basis of a law. Article 74 of the GG defines who (Federal Republic/States) is competent to legislate the Courts Constitution Act*[8]*. Section 28 of the Courts Constitution Act regulates courts with lay judges. The entire procedure to appoint lay judges is regulated by law. In accordance with Article 97 of the GG, every judge (professional judges as well as lay judges) is independent and only subject to the law. Article 44 of the DRiG lays down special rules for lay judges. Article of the 45 DRiG states explicitly that lay judges are as independent as professional judges*" (Speyer Martin, judge).

Emil Karlsson, Sweden, states that "*according to Chapter 11 Section 2 of the Instrument of Government (which is a part of the Constitution of Sweden) provisions on the judicial tasks of the courts, on the main features of their organization and on the trial, in other respects than are concerned in the Instrument of Government, are given by law. Hence, provisions concerning the participation of lay judges are given by law, which is in line with the constitution*" (Emil Karlsson, Deputy Director Division of Procedural Law and Court Issues Ministry of Justice).

The Constitution of Lithuania, as well as the constitutions of Finland or Estonia, contains general provisions on the separation of powers (legislative, executive, and judicial powers)[9], the structure of courts[10], and the appointment of judges[11], which, as indicated above, in Finland are

[7] The German Judiciary Act in the version promulgated on April 19, 1972 (Federal Law Gazette l p. 713), as last amended by Article 9 of the Act of June 8, 2017 (Federal Law Gazette l p. 1570). http://www.gesetze-im-internet.de/englisch_drig/englisch_drig.html#p0226.

[8] The Courts Constitution Act. http://www.gesetze-im-internet.de/englisch_gvg/.

[9] According to Paragraph 1 of Article 109 of the Constitution, justice in the Republic of Lithuania is administered only by courts.

[10] According to Paragraph 1 of Article 111, the courts of the Republic of Lithuania are the Supreme Court of Lithuania, the Court of Appeal of Lithuania, and regional and district courts.

considered to be sufficient by the courts and their members, i.e. professional judges and non-professional (lay) judges, to protect their independence. A similar position is taken in Germany and Sweden. Therefore, it would be expedient to analyse whether such exclusively legal regulation would be sufficient for the introduction of public representatives in Lithuania in the next chapter.

As stated by Tonio Borg from Malta "*the Constitution of Malta, unlike the European Convention on Human Rights (hereinafter – the Convention), allows criminal proceedings to be decided only by a Court. No adjudicating authority may decide criminal cases. Consequent attempts at introducing lay judges to criminal proceedings have been declared unconstitutional (Police v. Emanuel Vella judgment of the Constitutional Court of 28th June 1983). This rule has been extended to cover administrative penalties: if they are stiff and punitive, they cannot be applied by any organ or person other than a court presided over by a magistrate (inferior courts) or a judge (superior courts). We have had a trial by jury since the 1850's. This system is not enshrined in the written Constitution but is contained in the Criminal Code which is an ordinary law. Technically it can be repealed at any time. Lay judges have been introduced to non-criminal cases through the setting up of the Small Claims Tribunal which covers civil cases under 15,000 euros, presided over by a lawyer (not a judge or magistrate and in the establishment of administrative tribunals dealing with specific subjects in civil law e.g. lease law, industrial cases, unfair dismissal, agricultural leases, tax matters, etc.*" (Prof. Tonio Borg, senior lecturer in public law at the University of Malta).

The Hungarian authorities indicate that "*the following main pieces of legislation contain detailed provisions on the Hungarian judicial system, its operation and the status of judges and judicial staff*[12]." (Head of Department/Associate Judge, Department of Judicial Relations, Ministry of Justice). According to Varga Zsolt András "*the Fundamental Law of Hungary*[13] *makes a small distinction between "judges" and "professional judges", which is sufficient at the constitutional level: Article 26 of the Constitution of Hungary: (1) Judges shall be independent and responsible only to the law; they shall not be instructed in their activity of jurisdiction. Judges may only be removed from office on the grounds of and in accordance with the procedure specified by cardinal*

[11] Article 112 of the Constitution on the appointment of judges, which is regulated in detail in Chapter 7 of the Law on Courts.

[12] The Fundamental Law of Hungary. (The current text of the Fundamental Law is available at the following website in Hungarian: https://net.jogtar.hu/jogszabaly?docid=A1100425.ATV); Act CLXI of 2011 on the Organization and Administration of Courts (The current text of the Act is available at the following website in Hungarian: https://net.jogtar.hu/jogszabaly?docid=A1100161.TV); Act CLXII of 2011 on the Legal Status and Remuneration of Judges (The current text of the Act is available at the following website in Hungarian: https://net.jogtar.hu/jogszabaly?docid=A1100162.TV); Act LXVIII of 1997 on the Legal Status of Judicial Staff (The current text of the Act is available at the following website in Hungarian: https://net.jogtar.hu/jogszabaly?docid=99700068.TV).

[13] Fundamental Law of Hungary (Magyarország Alaptörvénye) dated April 25, 2011 https://net.jogtar.hu/jogszabaly?docid=A1100425.ATV.

statute. Judges may not be members of political parties and may not engage in political activities. Regulation 26(2) goes on to state that "professional judges shall be appointed by the President of the Republic in the manner specified by cardinal statute". Those who have reached the age of thirty may be appointed as judges. Except for the President of the Curia and President of the National Office for the Judiciary the legal status of judges may last until the general retiring age" (Prof. Dr. Varga Zsolt András, Pazmany Peter Catholic University, Faculty of Law and Political Science, Department of Administrative Law).

In summary of the above discussion in this chapter, the following position of expert Prof. E. Kūris, the participant of this study, can be quoted: "*Countries are different: their systems, mentalities, methods, and traditions of interpreting the constitution also differ, among other things*". Due to this, it is impossible to conclude that not establishing the institution of lay judges or jurors at the constitutional level violates the principles of separation of power and rule of law or the constitution itself, since people not explicitly specified in the constitution are entrusted with administering justice. In addition to this, "*every country has its own constitutional identity*" (Kūris, 2019, p. 157). Also, this may be supplemented by the opinion of Aharon Barak, who states that "*democratic countries differ from one another, and what is good and proper for one may not be good and proper for another" (Barak, 2006, p. 14).* A. Barak has also accurately pointed out that *"comparative law is not just about comparing laws. Comparative interpretation can take place only among legal systems that share a common ideological basis*" (Barak, 2005, p. 170).

Having discussed the attitude of the representatives of the states whose lay judges are only established at the statutory level regarding the constitutionality of such regulation, we have to further review the situation in Lithuania. Can lay judges arise in the Lithuanian justice system without the intervention in the Constitution?

2. Research methodology

Qualitative research has been carried out. The following data collection, data processing, and data analysis methods have been employed:

1. Data collection methods. The questionnaires made up of open-ended questions were developed (the survey was conducted via email). The data regarding the level of regulation of public participation was collected remotely from the participants from various EU countries (judges, representatives of courts, scholars, representatives of ministries of justice)[14]. Also, an interview with the expert (the interview with Prof. E. Kūris, former President of the Constitutional Court of the Republic of Lithuania, current judge of the European Court of Human Rights, via email) was carried out. Finally, also thematic analysis, and document selection were performed. The

[14] This question is discussed in more detail in the first chapter of this paper.

participants of the study and the expert were asked problem questions related to constitutional regulation.

2. Data processing methods. The data, obtained from the questionnaires and the interview, was processed by analysing and comparing it with the contents of the documents, i.e. research papers, other literature related to the issue of the study, constitutions of EU countries, and other international and national legislation, and by summarising the educational (legal) practice under the supervision of Prof. V. Sinkevičius via email.

3. Data analysis methods. A dogmatic and comparative analysis was performed.

The data from the questionnaires were collected, processed, and analysed from spring 2019 until the submission of this paper for publication, i.e. spring 2020. The interview was carried out via email: the questions were sent on February 5th, and the answers to them received on February 28th, 2020.

The scope of the study is the legal framework of EU countries[15], and the selected from them EU countries that have lay participation established only at the legislative (ordinary) level instead of the constitutional level, i.e. Estonia, Malta, Finland, Sweden, Hungary, and Germany. As can be seen, not all states in the EU have lay judges at the constitutional level. Thus, Lithuania might also not need the intervention in the Constitution in order to introduce lay judges?[16]

In addition, Poland, Latvia, Slovenia, Slovakia, and Norway were included in the study with regards to the amendment of Article 112(5) of the Constitution. The participants from Latvia, Slovenia, Slovakia, and Norway agreed to participate in the study but were unable to provide answers before submitting the paper for review[17].

3. The necessity of the amendments to the Constitution of Lithuania in order to introduce lay judges

Undoubtedly, the stability of a constitution does not deny the dynamic nature of regulation. It is best to combine the stability of a constitution with the dynamic nature of the constitutional system. The latter may sometimes be ensured by developing the constitutional rules and principles in the jurisprudence of the constitutional court as well as amendments to the constitution (but only in cases where such correction is certainly necessary). In terms of the general goals of constitutional amendments, there are two types of constitutional amendments: the first type fills textual gaps and corrects technical flaws, while the second type marks significant changes occurring in the political system (Jarašiūnas, 2009). According to D. Butvilavičius globalisation, religious fundamentalism,

[15] Not all the EU countries participated in the research, i.e. Ireland, Austria, Greece, Cypress, Luxembourg, and Portugal did not participate, as they just did not respond to the requests sent by email.
[16] This question is discussed in more detail in the third chapter of this paper.
[17] This question is discussed in more detail in the fourth chapter of this paper.

terrorist threat, demographic changes and migration, political processes taking place in a country, emerging constitutional flaws, increasing gap between the material and formal constitutions and, undoubtedly, various demands of the civil society may influence the decision to amend the constitution (Butvilavičius, 2013, p. 5). In the case analysed in this paper, i.e. the second type as defined by Egidijus Jarašiūnas and D. Butvilavičius, there is a political will in Lithuania to introduce the members of the public to the judicial system, thus deprofessionalising it.

Article 109(1) of the Constitution states that "in the Republic of Lithuania, justice shall be administered only by courts", the same as Article 146 of the Constitution of Estonia ("Justice shall be administered solely by the courts"). As mentioned in the first chapter of this paper, the participant of the study (expert) Prof. E. Kūris believes, "*that the interpretation of the Estonian Constitution* (as mentioned in the first chapter of this paper) *is not suitable for Lithuania (or not suitable anymore), because the constitutional definition of a judge cannot be interpreted as if it encompasses lay judges or, especially, jurors: the Constitutional Court has repeatedly stated that the judicial power is formed on a professional basis*". The interpretation of the interpreter (i.e. the Constitutional Court) of the Constitution that the judicial power is formed on a professional basis is provided in rulings of the Constitutional Court dated 21 December 1999, 12 July 2001, 31 March 2004 (Kūris, 2006, p. 9). It should also be kept in mind that the principal differences that mark the boundaries of the partnership between the judicial power and other powers: the courts have the exclusive competence to administer justice; justice must be administered in accordance with the law; therefore, the judicial power is formed on a professional instead of political basis. This determines its special place in the government system and the special status of judges (ruling of the Constitutional Court dated 21 December 1999, decision dated 12 January 2000, ruling dated 12 July 2001, conclusion dated 21 March 2004, rulings dated 13 May 2004, 16 January 2006, 28 March 2006, 9 May 2006, decision dated 8 August 2006, rulings dated 27 November 2006, 22 October 2007, 20 February 2008, 29 June 2010, 14 February 2011, 7 April 2011) (Kūris, 2011, p. 41). Due to the fact that judicial power is formed on a professional basis, the approach of the other countries mentioned above would not be suitable for Lithuania. In the introduction of this paper, other opinions of scholars regarding the necessity to amend the Constitution of Lithuania in order to introduce the concept of lay judges were discussed. Therefore, assuming that the constitutional amendment should be adopted, it is not analysed further.

However, a situation that has not been discovered in scientific literature should be discussed as it may pose the question of whether the amendment is actually necessary. How much does the fact that the constitutionality of lay judges was not disputed from 1990 to 1995, when lay judges were in the composition of Lithuanian courts, affect the inevitability of constitutional amendments? Laws and parts thereof are considered to be legal and compliant with the Constitution until they are

declared to be in conflict with the Constitution. Participant of the study (expert) Prof. E. Kūris says "*that the fact that the constitutionality of lay judges was not disputed then does not prove anything: inertia was at play, so no one disputed it even though it was possible. There were no transitional provisions and it was a serious flaw of the Constitution. Once the Constitution came into force, in the formal sense, many things that worked were unconstitutional (but were never declared as such). For example, the two-tier ordinary court system: the Constitution explicitly establishes a four-tier system. The Constitution was developed under the condition of time trouble; otherwise, it might have included other provisions that would have established time limits for reforming the judicial system and other institutions or procedures. However, reforming the judicial system according to the constitutional requirements took time. The same can be said about the institution of the parliamentary ombudsman or the Commander of the Armed Forces, etc. There was real haste to establish the Constitutional Court because the presidential election was scheduled, and the oath of the President could only be taken by the President of the Constitutional Court*".

Having discussed that the amendment of the Constitution is inevitable in the Lithuanian context, further the extent of its amendment is discussed.

There is a draft amendment to Article 48(4) of the Constitution registered at the Seimas. The draft amendment states that "<…> citizens' activity as a lay judge <…> shall not be considered forced labour". As mentioned in a discussion with Prof. V. Sinkevičius, "*Article 48 of the Constitution may pose problems when it comes to implementing it: for example, can a lay judge that has been fined for failure to appear at a court hearing administer justice?*" Although Article 48 of the Constitution may be problematic merely because of its implementation, this amendment is necessary and, thus, not analysed further in this paper.

As mentioned above, there is a draft amendment to Article 109 of the Constitution, which would supplement it with Paragraph 5, registered at the Seimas. The paragraph states that "in the cases established by law, citizens who have taken the oath of a lay judge consider cases and adopt decisions together with judges". Once this amendment is passed, lay judges selected from members of the public will be able to participate in examining cases in courts of first instance and rule along with the judges[18].

The amendment of the Constitution by introducing lay judges poses the question whether such members of the public should have the same rights and duties as professional judges do establish at the constitutional level: restrictions on employment and political activities (Article 113); prohibition to interfere with the activities of a lay judge and guarantee of legal immunity against criminal prosecution (Article 114); grounds for the dismissal of a lay judge (Article 115).

[18] As mentioned in this chapter of this paper the amendment of the Constitution is inevitable in the Lithuanian context because the judicial power is formed on a professional basis.

Establishing these rights and duties at the legislative level would not ensure equal status because it would allow establishing different rights and duties for lay judges, thus violating the principle of the equal legal status of judges developed by the Constitutional Court (rulings of the Constitutional Court dated 9 May 2006, 22 October 2007, 14 February 2011). The equal legal status of judges when administering justice is an important element of the constitutional principle of judicial independence (ruling of the Constitutional Court dated 14 February 2011). Participant of the study (expert) Prof. E. Kūris believes "*it is not necessary because it would be sufficient to supplement the Constitution with a provision that the appointment, dismissal, status, and guarantees of independence of lay judges are established by law (similarly as Article 125(2) does with regards to the Chairperson of the Board of the Bank of Lithuania)*". In a discussion Prof. V. Sinkevičius, said "*that the status of lay judges should be determined not only by the Constitution, but also by law; in addition to this, there is Article 111(4) of the Constitution*[19]*. Therefore, the Law on Courts should be supplemented with the relevant provisions*". This legal analysis leads us to the conclusion that it is not only necessary to amend Article 48(4) and supplement Article 109 of the Constitution with Paragraph 5, but also to supplement Article 111 of the Constitution with Paragraph 5: "the appointment and dismissal, legal status and guarantees of independence of unprofessional judges are established by law".

D. Beinoravičius and M. Vainiutė discuss the idea of introducing the institution of lay judges gradually; in this scenario lay judges would not receive remuneration and any member of the public could become a lay judge. Such a lay judge would have the procedural right to ask and receive reasoned explanations, appeal insufficient explanations, question the validity and clarity of such explanations, and so on. This conceptual model would not intervene in the Constitution and the legal system but would instead supplement the practice and support the constitutional goal to strengthen the relationship between authorities and the public. It would be appropriate to develop a model based on this goal (Beinoravičius and Vainiutė, 2018, p. 31). Prof. E. Kūris, a participant of the study (expert), "*agrees with the introduction of this model, noting that at first, a gradual introduction of the institution of lay judges (based on a general constitutional amendment) should be considered for very limited categories of cases, the list of which could later be expanded. The Concept of Lay Judges*[20] *lists these categories of cases in an overly-detailed manner*". A gradual introduction of the institution of lay judges seems to be the most appropriate – of course, this only applies to courts of the first instance, as discussed in a paper (Vėgėlė and Kazakevičiūtė, 2017,

[19] Article 111(4) of the Constitution states that the formation and competence of courts shall be established by the Law on Courts of the Republic of Lithuania.

[20] Approved by Resolution by the Seimas dated 11 October 2016 No. XII-2676.
(Lithuanian: "Visuomeninių teisėjų (tarėjų) instituto teismuose koncepcija"). https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/48f22ce3912f11e68adcda1bb2f432d1?jfwid=1m73rttka.

256–270) focused on the influence of the institution of lay judges on case law and whether this institution is compatible with the principle of legal certainty. If such regulation succeeds, the list of categories of cases that members of the public adjudicate may be expanded as necessary. Such gradual inclusion of members of the public in the administration of justice would ensure that the state can bear the financial burden. There would also be no significant intervention in the functioning of the judiciary, so if the selection mechanism fails or malfunctions, the administration of justice is disturbed as little as possible. If public participation in the administration of justice succeeds in the practical sense, another model that is the most appropriate for Lithuania could be introduced, after analysing the practice and regulation of other EU countries.

Especially, since in order to ensure proper exercise of the functions of members of the public, the financial aspect is also important: failure to grant funds for the establishment of this institution would make it impossible to implement it, and would violate the Constitution. The Constitutional Court noted in its ruling dated 13 December 2004 that before legislating, the legislator must allocate funds necessary to implement such a law, i.e. according to the Constitution, the legislator shall not create a legal situation where a law or another legal act that requires funds is made but the necessary funds are not allocated or an insufficient amount is allocated. The significant financial burden of the lay judge's institute is illustrated by the example of Finland. "*Nowadays, in the district courts of Finland, all civil cases and most criminal cases are decided by professional judges. In 2018, only about 3 600,00 cases out of the total of 56 000,00 criminal cases were decided with a professional judge and lay judges. In 2018, there were about 1 470,00 lay judges in the 20 district courts. This means each lay judge participated in the decision making of only 2–3 cases. The hearing fees and the reimbursement for possible loss of income paid to the lay judges are about 1 300 000,00 euros per year. In addition, administrative work in the courts and the Finnish Government Shared Services Centre for Finance and HR costs a few hundred thousand euro per year. The total cost of the lay judge system is about 1,5 million euro per year*" (Senior Specialist, Ministry of Justice, Department for Private Law and Administration of Justice, Court Affairs Unit). It should also be noted that members of the public should have separate chambers where they could wait for hearings to start which would allow administering justice properly and efficiently. In this case, real funding must be provided so as not to violate the Constitution.

Therefore, in order to introduce the institution of lay judges to Lithuania, first of all, the moderate (gradual) model should be applied. Once it succeeds and, having analysed the practice of other EU countries, the most appropriate (optimal) model for Lithuania is discovered, not only the matter of amending Article 48(4) of the Constitution and supplementing Article 109 with Paragraph 5, but also the matter of supplementing Article 111 of the Constitution with Paragraph 5 (that the appointment and dismissal, legal status and guarantees of independence of unprofessional judges

are established by law) should be dealt with in a comprehensive manner. If a constitutional amendment is, in fact, necessary and if it does not violate the consistency of constitutional regulation, the amendment should be adopted in a timely (Butvilavičius, 2013, p. 52) and comprehensive manner so that the principle of the integrity of the Constitution (analysed in the next chapter) is maintained.

4. The selection of lay judges and the need to amend Article 112(5) of the Constitution

This chapter is focused on the selection of lay judges and the related issue of the amendment to Article 112(5) of the Constitution. The issue of selection, i.e. who should be entrusted with appointing and dismissing lay judges is important from the independence point-of-view. In order to protect lay judges from external influence, the same independence and depoliticising should also apply. It must be ensured that lay judges are not appointed in order to influence their decisions. However, in the legal doctrine, the importance of the procedure for the appointment of judges for judicial independence is also emphasised (Schabas, 2017, p. 294).

The Constitutional Court of Latvia in its ruling dated 1 April 2004 (point 10)[21] ruled "that under rule of law, the principle of separation of powers especially protects the judicial independence from the intervention of the executive. Entrusting the minister of justice with the selection and appointment of lay judges may raise suspicions regarding the independence of such a candidate from the executive power, resulting in doubts surrounding the impartiality of decisions made by such a lay judge. Therefore, a procedure under which the minister of justice appoints lay judges is in conflict with both the constitution and the definition of an independent court laid down in Article 6 of the Convention". In the case law of the European Court of Human Rights (hereinafter – the ECHR) it is noted that even though the Convention does not mention the principle of the separation of powers, the significance of this principle on judicial independence is emphasised[22]. It was also ruled that the Convention was violated when the appointed judge was subordinate to the appointing minister[23].

In addition to this, courts that consist mostly of lay judges who are also party members can easily become a political institution the decisions of which are influenced not only by the executive but also by the legislative power. According to the example of Finland, "*the Ministry of Justice confirms the total number of lay judges in the district courts. The municipal councils appoint the lay judges for a term of four years. The courts are independent in exercising their judicial powers.*

[21] The Constitutional Court of the Republic of Latvia, 1 April 2004, ruling. https://likumi.lv/ta/id/96115-par-likuma-par-tiesu-varu-75-panta-ietvertas-normas-vardu-vai-tiesas-piesedetajam-atbilstibu-latvijas-republikas-satversmes-84-.
[22] Kleyn and others v. the Netherlands, no. 39343/98, 39651/98, 43147/98 and 46664/99), § 193, ECHR, 2003-III.
[23] Brudnicka and others v. Poland, no. 54723/00, § 41, ECHR, 2005-III.

From this point of view, Parliamentary Ombudsman of Finland[24] *and The Council of Europe's anti-corruption group*[25] *have repeatedly pointed out that lay judges being appointed by the municipal councils which are political bodies is problematic. The courts should both be and seem independent and impartial in their decision-making and they may not seem so when a political body appoints some members of the courts*" (Senior Specialist Ministry of Justice, Department for Private Law and Administration of Justice, Court Affairs Unit). Thus, the selection of lay judges is also criticised in Finland, because some of the candidates are party members which is incompatible with the requirement of independence of lay judges.

Article 114(1) of the Constitution of Lithuania states that „interference by institutions of State power and governance, Members of the Seimas and other officials, political parties, political and public organisations, or citizens with the activities of a judge or the court shall be prohibited and shall incur liability provided for by law". Thus, entrusting municipal councils or ministries of justice with the procedure of selecting members of the public would violate this constitutional rule because there may be doubts regarding the independence and impartiality of members of the public selected in such a way. For example, when a case brought before a mixed panel (when lay judges have voting rights) the legality of acts and actions made by municipal administration bodies or compensation for damages caused by unlawful acts of authorities when the state is represented by the Ministry of Justice.

The Constitutional Court of the Republic of Lithuania has also presented an exceptionally broad analysis of judicial impartiality and independence as an element of the administration of justice (rulings of the Constitutional Court of the Republic of Lithuania dated 21 December 1999 and 27 November 2006) (Dereškevičiūtė, 2013, p. 120).

Consider the example of Poland when in its ruling dated 9 November 2005 in the judgment 119/10/A/2005 the Constitutional Tribunal of Poland decided on the necessity for the National Judicial Council (Polish: Krajowa Rada Sądownictwa) to defend judicial independence not only by forming the composition of professional judges but also by participating in selecting lay judges (Polish: Ławnicy). The question of whether the legislator should establish the procedure of selecting lay judges, analogous to the appointment of judges, was raised. In discussing this ruling of the Constitutional Tribunal of Poland Piotr Czerkawski said that "*the Constitutional Tribunal indicated (point 5.4.) that the current procedure is better (in theory and practice) than one that would be similar to the choice of judges. The point is that through lay judges, various groups of citizens become involved in the judiciary. They are to provide a social point of view and protect the Court against isolation and alienation. They are to ensure the courts' contact with the public. They are to*

[24] Parliamentary Ombudsman of Finland. https://www.oikeusasiamies.fi/en/web/guest.
[25] The Group of States against Corruption (GRECO). https://www.coe.int/en/web/greco.

be a "counterweight" to the professional factor (judges). The National Council of the Judiciary is a representation of the judicial community. It's the selection of lay judges could blur this division into social and professional factors. Lay judges participation in are a social factor, so they should be chosen by representatives of the society (municipal councils) and not representatives of the judiciary. If that were the case, lay judges would lose their position as a social factor. This would limit the opportunities for citizens to participate in justice. In addition, it would not be possible due to the number of lay judges (tens of thousands practically one time)" (Piotr Czerkawski, Judge of Regional court in Plock (Poland), Labour Law and Social Security Division). Therefore, the selection mechanism thereof does not have to be identical and the authority that appoints lay judges is not necessary; the most important thing is ensuring the independence of lay judges. Statutory provisions allowing judicial authorities (presidents of courts) to reject lay judges that fail to comply with statutory criteria (by suspending or dismissing such persons) to participate in the judicial system have been recognised as more functional.

The National Council of the Judiciary in Poland is a constitutional institution as well as in Lithuania. It suggests candidate judges to the President by proposing a motion (Article 179 of the Constitution). Such regulation is also established in the Act on the National Council of the Judiciary (Article 3(1)(2) of Chapter 2 "Competencies and structure of the Council"). According to Piotr Czerkawski "*Under Polish law, the Constitutional Tribunal of Poland chooses one candidate and proposes him to the President. This is obligatory. The President cannot appoint a judge who was not nominated earlier by the Constitutional Tribunal of Poland. But the President can refuse to appoint the candidate who was nominated by the Constitutional Tribunal of Poland without justification (if the President refuses the candidates, he does not have to explain the refusal). This situation occurs rarely and is very controversial. Lay judges in the ordinary court are chosen by the commune's council. The Constitutional Tribunal of Poland and the President do not play a role in the election of lay judges. The same in the Supreme Court, the lay judges are elected by the Senate to the Supreme Court*" (Piotr Czerkawski, Judge of Regional court in Plock (Poland), Labour Law and Social Security Division).

As can be seen, Act of Law on the organisation of common courts states the following: "The Minister of Justice, after consulting the National Council of the Judiciary, specifies, by regulation, the procedure for processing documents filed with councils of communes when submitting proposals concerning candidates for lay judges, the sample proposal form and the way of making the form available" (Article 162(11)). According to Piotr Czerkawski "*Such a regulation is issued after consulting the National Council of the Judiciary. This means that the Minister of Justice is obliged to send a draft regulation to the National Council of the Judiciary. The National Council of the Judiciary should issue an opinion on this project, but the opinion is not binding. Even if it is*

negative, the Minister of Justice may still issue a regulation with the content he wants. His obligation applies only to send for the purpose of issuing an opinion and waiting for it and to get acquainted and that is all. There is no requirement for permission. If compliance is required, the provisions use the words "after consent" or "with consent". The phrase: "after consulting" means only the need to get acquainted with the position of another body but without the obligation to take his opinion into account. It can be said that this is only a form of discussion. The National Court Register cannot force the Minister of Justice to take his position into account, it can only suggest" (Piotr Czerkawski, Judge of Regional court in Plock (Poland), Labour Law and Social Security Division). Thus, the opinion of the National Council of the Judiciary of Poland in the selection of lay judges is not binding; also, like the National Court Register of Poland, the Minister of Justice is free to choose the nomination of lay judges.

In the opinion of the author of this article, the involvement of an independent body in the selection of lay judges is necessary (by eliminating ministers of justice or municipal councils from their selection). This body should not participate in the selection of lay judges by an advisory vote ("proposal" is not binding), but its position should influence the entry of lay judges into the judicial system ("submission"). The reasons for this are discussed below.

The Consultative Council of European Judges (the CCJE) (hereafter referred to as "the Consultative Board") adopted the Grand Charter of Judges, which contains fundamental principles relating to judges and the judicial system, the Article 4 which states that "judicial independence shall be guaranteed in respect of judicial activities and in particular in respect of recruitment, nomination until the age of retirement, promotions, irremovability, training, judicial immunity, discipline, remuneration, and financing of the judiciary". In this sense, the rules on the appointment of judges are viewed positively, because Article 112(5) of the Constitution of Lithuania states that *a special institution of judges* provided for by law shall advise the President of the Republic on the appointment, promotion, transfer of judges, or their dismissal from office. In the Law on Courts of Lithuania, this authority is titled the Judicial Council and, in accordance with Article 119 of the Law on Courts, is defined as "an executive body of the self-governance of courts ensuring the independence of courts and judges". In Lithuania, Article 112(4) of the Constitution states that judges of courts of the first instance (district and regional courts) are appointed exclusively by the President of the Republic of Lithuania who is, as mentioned above, *advised* by the Judicial Council (Article 112(5) of the Constitution).

In one of his papers V. Sinkevičius noted that terms "proposal" and "submission" are not identical: "proposal" is not binding (i.e. it does not result in any legal consequences) while "submission" is the opposite and without it, the President of the Republic of Lithuania is unable to exercise his or her constitutional right to appoint and dismiss judges (Sinkevičius, 2016, p. 29).

Therefore, in this case, the advice has legal power: if the President of the Republic of Lithuania does not receive approval from this authority, he or she cannot appoint someone as a judge (or dismiss such an individual, etc.) (rulings of the Constitutional Court of the Republic of Lithuania dated 21 December 1999, 9 May 2006, 20 December 2007). As can be seen, it is different from the case of Poland, when the President can refuse to appoint the candidate who was nominated by the National Council of the Judiciary of Poland without justification (if the President refuses the candidates, he does not have to explain the refusal).

The Judicial Council has stated its position on the selection of lay judges in its remarks submitted to the Government with regards to the draft Law on Lay Judges[26]. The Judicial Council proposes to assign functions important for the formation of the body of lay judges to the Council itself. For example, the Judicial Council should be entrusted with the right to include and remove an individual from the list of lay judges, otherwise, there is a risk of violating Article 6 of the Convention. If such a proposal were implemented, the Judicial Council would not only have the opportunity to assess every individual seeking to administer justice along with the judges but also would have the competence to approve the regulations of forming and managing the list of lay judges, to appoint members to the Lay Judge Candidate Selection Committee (hereinafter: the Selection Committee) and to approve the procedures thereof. The Government is suggesting to take into consideration some of the remarks (i.e. remarks related to the decision to include an individual into the list of lay judges, forming and managing this list and approving the composition of the Selection Committee)[27]. The Seimas has not yet presented its opinion (see Abstract "Originality / Value"). As regards the selection method, the Judicial Council has chosen the method of appointing based on selection instead of random selection (Jackson and Kovalev, 2006, p. 99–100). In the first stage, the individuals are appointed by certain entities (in this case, by the Judicial Council and, unlike in many countries, not by the minister of justice or municipalities) or express their wish to represent the public themselves. In the second stage, the list of candidates is approved, in this case, by the Judicial Council (and, unlike in many countries, not by the minister of justice or municipalities). It is the opinion of the Judicial Council that in terms of their constitutional status,

[26] Teisėjų tarybos 2019 m. lapkričio 18 d. atsakymas į Lietuvos Respublikos Teisingumo ministerijos 2019 m. spalio 31 d. pranešimą „Dėl įstatymų projektų, susijusių su Tarėjų instituto įtvirtinimu Lietuvoje, derinimo". https://e-seimas.lrs.lt/portal/legalAct/lt/TAK/9387e5f009e111eaa6fdea593a68dd73?positionInSearchResults=5&searchModelUUID=6cfb759f-0e62-42ca-b962-089061e4fbe9.

[27] Lietuvos Respublikos Vyriausybės 2019 m. gruodžio 18 d. nutarimas Nr. 1348 „Dėl Lietuvos Respublikos Tarėjų įstatymo projekto Nr. XIIIP-3891, Lietuvos Respublikos civilinio proceso kodekso 62 straipsnio pakeitimo ir kodekso papildymo XIV skyriaus pirmuoju[1] skirsniu įstatymo projekto Nr. XIIIP-3892, Lietuvos Respublikos baudžiamojo proceso kodekso 40 straipsnio pakeitimo ir kodekso papildymo XVIII[1] skyriumi įstatymo projekto Nr. XIIIP-3893, Lietuvos Respublikos baudžiamojo kodekso 230 ir 231 straipsnių pakeitimo įstatymo projekto Nr. XIIIP-3894 ir Lietuvos Respublikos administracinių nusižengimų kodekso papildymo 226[2] straipsniu ir 589 straipsnio pakeitimo įstatymo projekto Nr. XIIIP-3895". https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/00e677612d3211ea8f0dfdc2b5879561?positionInSearchResults=0&searchModelUUID=6cfb759f-0e62-42ca-b962-089061e4fbe9.

lay judges should be as close as possible to a judge. This is an acceptable position since one of the aspects of judicial independence is the fact that all judges have the same legal status when administering justice (ruling of the Constitutional Court of the Republic of Lithuania dated 14 February 2011).

This position arises from Article 6 of the Convention that states that only a court that is independent of other authorities and also of the parties can be considered independent[28]. Modern international independence standards for courts and judges are discussed in Recommendation CM/Rec(2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities (adopted by the Committee of Ministers on 17 November 2010 at the 1098th meeting of the Ministers' Deputies) (hereinafter: the Recommendations)[29], where it is noted that the independence of the judiciary secures for every person the right to a fair trial and, therefore, is not a privilege for judges, but a guarantee of respect for human rights and fundamental freedoms, allowing every person to have confidence in the justice system. The aforementioned ruling of the Constitutional Court of Latvia states that a procedure under which the minister of justice appoints lay judges is in conflict with both the constitution and the definition of an independent court laid down in Article 6 of the Convention.

In its ruling dated 5 September 2012, the Constitutional Court of Lithuania emphasised that a judgment of the ECHR cannot by itself be the constitutional basis for reinterpreting (correcting) the official constitutional doctrine; the principle of the primacy of the Constitution suggests that the only way to eliminate the incompatibility between the provisions of the Constitution and the Convention is to pass the respective amendments to the Constitution (Konstituciniai ginčai, 2019, p. 154). In its ruling dated 14 March 2006, the Constitutional Court of Lithuania noted that respect for international law, complying with international commitments, respect for the accepted principles of international law (including the *pacta sunt servanda* principle) is the tradition and constitutional principle of restored independent Lithuania. Also, Article 135(1) of the Constitution states that the Republic of Lithuania shall follow the universally recognised principles and norms of international law. Article 135(1) imposes the duty to eliminate the incompatibility of the Constitution and the Convention. Having considered the fact that the Lithuanian legal system is based on the principle of the primacy of the Constitution, the Constitutional Court determined that the only way to eliminate this incompatibility is to pass the respective amendments to the Constitution (Konstituciniai ginčai, 2019, p. 370–371).

[28] Beaumartin v. France, no. 15287/89, § 38, ECHR, 1994-XI.

[29] Recommendation CM/Rec(2010)12 of the Committee of Ministers to member states on judges: independence, efficiency, and responsibilities (Adopted by the Committee of Ministers on 17 November 2010 at the 1098th meeting of the Ministers' Deputies). https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805afb78.

Lithuania should harmonise its constitutional and statutory regulation with the requirements of the Convention, as imposed by Article 46(1) of the Convention, according to which the High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties. When introducing lay judges, constitutional regulation should be amended in a way that complies with the provisions of the Convention regarding the definition of an independent court and, on the basis of the new constitutional regulation, statutory regulation should be developed or amended, thus avoiding judgments of the ECHR concerned with the violation of Article 6 of the Convention.

In the discussion with the author of the article about the issue, prof. V. Sinkevičius raises the following question: "*is it enough to specify in Article 109(1) of the Constitution that there are also lay judges in the courts and that their participation in the adjudication of cases is determined by law? Should Article 112(5)* ("A special institution of judges provided for by law shall advise the President of the Republic on the appointment, promotion, transfer of judges, or their dismissal from office"), *which establishes an independent judiciary to advice on judge's appointment or dismissal, etc. be amended as well? In other words, can lay judges, if they have the power of the decisive vote, emerge in a different way than conventional judges? If an amendment to the Constitution was made and it was established that they could enter the system in a different way (without the independent advice of the special institution of judges* (The Judicial Council), *provided in Article 112(5)), would such an amendment be compatible with the Constitution and its principle of integrity?*"

The principle of legal certainty laid down in Article 6(1) of the Constitution, i.e. the provision that "the Constitution shall be an integral <…> act", poses the imperative that constitutional amendments cannot violate the consistency of constitutional provisions and values set out thereof. Provisions of the Constitution and the implementation (application) thereof cannot be interpreted in a way that makes that constitutional provision fictitious or in a way that goes against the purpose and nature of that constitutional provision (Sinkevičius, 2015, p. 219). Article 109(1) of the Constitution states that justice shall be administered only by courts. It is a constitutional value that cannot be contradicted by amendments to the Constitution (Sinkevičius, 2015, p. 219). There is an amendment to the Constitution that supplements Article 109 of the Constitution with Paragraph 5 registered at the Seimas, stating that "in the cases established by law, citizens who have taken the oath of a lay judge consider cases and adopt decisions together with judges". Article 109(2) of the Constitution states that while administering justice, the judge and courts shall be independent. This independence is guaranteed by an independent institution of judges – the Judicial Council – established by Article 112(5) of the Constitution. Therefore, Article 112(5) should be amended so that lay judges could only enter the judicial system via the independent institution of judges. One of

the main requirements for judicial independence is the appointment procedure for judges[30]. It is especially notable that since Article 109(4) of the Constitution states that the court shall adopt decisions in the name of the Republic of Lithuania, it means that by having voting rights, lay judges will do the same. Article 109(3) of the Constitution states that when considering cases, judges shall obey only the law; therefore, much like professional judges, lay judges should also obey the Constitution and the laws only. In its ruling dated 24 January 2014 the Constitutional Court ruled that constitutional amendments cannot violate the consistency of constitutional provisions and values set out thereof because it would violate the integrity of the Constitution. The principle of constitutional integrity, along with the hierarchy of the values laid down in the Constitution, is the criteria of the constitutionality of amendments to the Constitution (Konstituciniai ginčai, 2019, p. 38). Constitutional amendments have to be laid down in the respective Articles of the Constitution that regulate certain relations, otherwise, the systematic arrangement of constitutional provisions would be violated (Sinkevičius, 2015, p. 221).

Thus, if it were decided to supplement Article 109 of the Constitution with Paragraph 5, other related constitutional provisions should also be amended, inter alia Article 111 of the Constitution should be supplemented with Paragraph 5 and Article 112(5) of the Constitution that requires for an independent institution of judges to participate in the selection of judges should also be amended. Otherwise, i.e. if only Article 48(4) were amended and Article 109 were supplemented with Paragraph 5, the adoption of a constitutional amendment that expands the list of entities that administer justice would at least temporarily (until the Seimas adopts subsequent constitutional amendments) cause a contradiction between constitutional provisions, thus creating conditions for violating constitutional values. Even if temporary, such a situation where constitutional amendments disturb the integrity and consistency of the Constitution, as well as the balance of constitutional values, cannot be justified and tolerated (Butvilavičius, 2013, p. 143). When considering constitutional amendments, one should not ignore the fact that corrections of constitutional rules or principles inevitably affect not only the body of the constitution (the text) but also its spirit (the essence); therefore, the content and coherence of constitutional amendments should be assessed both in the context of the specific provision and constitutional concept as well as the entirety of constitutional regulation (Butvilavičius, 2013, p. 51).

In his comment about the amendment to Article 112(5) of the Constitution, Prof. Varga Zsolt András from Hungary said the following: "*I have no strict position. The appropriate "place" for the regulation of an institution and the appropriate level of details in that regulation depends mostly on the constitutional custom or habit of a country (or even a more general "fashion" in a given era). Actually the fashion seems to prefer rather detailed regulations. However, the more*

[30] Ramos Nunes De Carvalho E Sá v. Portugal, no. 55391/13, 57728/13 et 74041/13, § 153–156, ECHR, 2018-XI.

detailed a constitution is, the less flexibility is granted to react by simple laws to actual challenges" (Prof. Varga Zsolt András, Pazmany Peter Catholic University, Faculty of Law and Political Science, Department of Administrative Law).

Therefore, in order to ensure the stability and certainty of the legal system, a regulatory mechanism that does not result in legal uncertainty is required. The Constitution should also be modified as necessary so that its articles do not contradict each other. Constitutional amendments cannot go against the concept of a Constitution as a single act (rulings of the Constitutional Court dated 24 September 1998, 23 October 2002, 25 November 2002, 4 March 2003, 4 July 2003, 30 September 2003, 3 December 2003, 15 April 2004, 24 January 2014 and 11 July 2014). In addition to this, Lithuania should align its regulation established at the constitutional and legislative levels with the requirements of the Convention, in this case the requirement of judicial independence (Article 6 of the Convention). All this leads to the fourth amendment, i.e. the supplement of Article 112(5) of the Constitution that states the following: "A special institution of judges provided for by law shall advise the President of the Republic on the appointment, promotion, transfer of judges, or their dismissal from office" and should be supplemented with the following: that it also decides on the appointment and dismissal of lay judges or participates in the selection of lay judges.

5. Conclusions

For EU countries that have lay participation established at the legislative (ordinary) instead of the highest (constitutional) level, it is not necessary to amend the Constitution. This is due to the differences between the countries, their systems, and mentality, methods and tradition of constitutional interpretation and constitutional identity.

The findings of the study showed that the constitutional amendment is necessary for Lithuania because the judicial power is formed on a professional basis. As demonstrated by the opinions of the authors presented in the introduction of the paper, these grounds for a constitutional amendment were not discovered (or formulated).

In order to introduce lay judges, a moderate (gradual) model is the most appropriate for Lithuania. This model would allow avoiding intervening in the Constitution. Once it succeeds, and, having analysed the practice of other EU countries, the most appropriate model for Lithuania is discovered, not only the matter of amending Article 48(4) of the Constitution and supplementing Article 109 with Paragraph 5, but also the matter of supplementing Article 111 of the Constitution with Paragraph 5 (that the appointment and dismissal, legal status and guarantees of independence of unprofessional judges are established by law) should be dealt with in a comprehensive manner. Such an amendment is necessary in order to ensure the equal status of judges and lay judges. Supplementing Article 112(5) of the Constitution ("A special institution of judges provided for by

law shall advise the President of the Republic on the appointment, promotion, transfer of judges, or their dismissal from office") with that it also decides on the appointment and dismissal of lay judges or participates in the selection of lay judges is also necessary in order to avoid violating the Constitution and the principle of integrity thereof. In addition to this, constitutional regulation should be amended in a way that complies with the provisions of the Convention regarding the definition of an independent court and, on the basis of the new constitutional regulation, statutory regulation should be developed or amended, thus avoiding judgments of the ECHR concerned with the violation of Article 6 of the Convention.

Having discussed the regulatory issues pertaining to the introduction of public participation (including the procedure for selecting lay judges), another study focused on the legal status of lay judges and the relationship between this status and the rights of an individual to a fair trial is recommended to be conducted. The analysis of these issues (as well as the research questions provided in this article) is aimed at discovering the most appropriate (optimal) model of introducing public participation to the administration of justice for Lithuania.

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